

1 routine tasks" -- did not sufficiently address certain opined limitations with regard to plaintiff's
 2 concentration, persistence, or pace.¹ (Objections at 5). Defendant cites Stubbs-Danielson v.
 3 Astrue, 539 F.3d 1169, 1174-76 (9th Cir. 2008), for the proposition that "an RFC finding is the
 4 exclusive arena of the ALJ, and it is within the ALJ's authority to translate functional limitations
 5 in work related restrictions." (Objections at 4). The facts here are distinguishable from those in
 6 Stubbs, and are more similar to those in Brink v. Comm'r of Soc. Sec. Admin., 343 Fed. Appx.
 7 211, 212 (9th Cir. 2009) (citable for its persuasive value pursuant to Ninth Circuit Rule 36-3)
 8 (where medical evidence established difficulties with concentration, persistence, or pace, "the
 9 ALJ's initial hypothetical question to the vocational expert referenc[ing] only 'simple, repetitive
 10 work,' without including limitations on concentration, persistence or pace" was error). Whereas
 11 in Stubbs, the medical testimony "did not establish any limitations in concentration, persistence,
 12 or pace," the medical evidence presented in this case (and accepted by the ALJ in his discussion
 13 of the "paragraph B" criteria) does establish that plaintiff has "moderate" difficulties with
 14 concentration, persistence, or pace. (See AR at 19); Brink, 343 Fed. Appx. at 212. For the same
 15 reasons as those provided in Brink, the Court finds Stubbs inapposite, and overrules defendant's
 16 objection on this issue.²

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 18 ¹ Defendant notes that the Magistrate Judge "erroneously referred to the evaluations as
 19 being assessments of [p]laintiff's 'residual functional capacity[.]" when they were "merely
 20 'functional assessments,'" and not plaintiff's RFC. (Objections at 4). Defendant is correct.
 21 However, nothing in the conclusions of the R&R would be altered by correcting the mistaken
 22 naming of the "functional assessments" at issue, and in fact the R&R goes on to distinguish
 23 between those assessments made for purposes of the ALJ's "paragraph B" analysis and those
 24 for purposes of an RFC assessment. (See R&R at 10-11).

25 ² Defendant appears to assert that any error by the ALJ in failing to "explicitly reference the
 26 limitations in [p]laintiff's RFC" was harmless, as "other evidence minimized the error perceived by
 27 the Magistrate Judge." (Objections at 6). Defendant argues that the VE's testimony that
 28 "production quotas were not applicable" to the jobs identified by the ALJ somehow distinguishes
 the instant facts from those in Newton v. Chater, 92 F.3d 688 (8th Cir. 1996), which held that an
 ALJ's hypothetical limiting the claimant to simple jobs did not adequately include deficiencies of
 concentration, persistence or pace, particularly where the hypothetical did not incorporate any
 specific testimony or refer to any other evidence indicating such deficiencies. See Newton, 92
 F.3d at 695; see also Thomas v. Barnhart, 278 F.3d 947, 956 (9th Cir. 2002). Here, however, the
 mere fact that the VE explained that production quotas were not applicable has no impact on the
 Court's conclusion herein, especially as the VE's testimony in response to plaintiff's counsel's

1 Second, defendant contends that the ALJ provided clear and convincing reasons for
2 rejecting the portion of one of plaintiff's physician's opinions that included a limitation to
3 "occasional[]" overhead activity "on both sides." (Objections at 7-9; R&R at 11). Specifically,
4 defendant asserts that the ALJ's "consideration of the evidence" -- by including it in his "thorough
5 discussion" of the medical evidence -- "provided clear and convincing reasons for not adopting
6 any overhead reaching limitations." (Objections at 9). The Court disagrees. As explained in the
7 R&R, the ALJ first erroneously asserted that the record "does not contain any opinions from
8 treating or examining physicians indicating that [plaintiff] ... has limitations greater than those
9 determined in this decision." (R&R at 12) (emphasis added). Next, having failed even to
10 acknowledge the limitation in question, the ALJ then failed to provide any reasons whatsoever as
11 to why the opinion containing that limitation was not adopted. (See R&R at 12; AR at 18);
12 see Lester, 81 F.3d at 830 ("the Commissioner must provide 'clear and convincing' reasons for
13 rejecting the uncontradicted opinion of an examining physician. And like the opinion of a treating
14 doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be
15 rejected for specific and legitimate reasons that are supported by substantial evidence in the
16 record.") (citation omitted).

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27 questions supports a finding -- contrary to that of the ALJ -- that an individual "deemed to have
28 a severely diminished pace and persistence" would not be able to do any jobs in the national
economy. (See AR at 46-47).

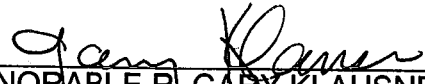
CONCLUSION

Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint, all of the records herein, the Report and Recommendation of the United States Magistrate Judge, defendant's Objections to the Report and Recommendation, and plaintiff's Response. The Court has made a de novo determination of the portions of the Report and Recommendation to which Objections were directed. The Court concurs with and accepts the findings and conclusions of the Magistrate Judge. Accordingly, IT IS ORDERED THAT:

1. Judgment shall be entered granting plaintiff's request for reversal, reversing the decision of the Commissioner and remanding this action to defendant for further proceedings.

2. The clerk shall serve this order and the judgment on all counsel or parties of record.

DATED: SEP 15 2014


HONORABLE R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE